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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

N APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
FACTS FOUND BY THE COMMISSION	4
CONTENTIONS OF APPELLANTS	8
PROCEEDINGS IN COURT BELOW	9
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. The failure and refusal of the railroads to establish through routes and joint differential rates with appellant barge lines is not a discrimination prohibited by section 3 (4) of the Act, nor a violation of section 307 (d), or in contravention of the National Transportation Policy	20
A. The Commission's order does not violate section 3 (4) of the Act in failing to require appellee railroads to enter into through routes and establish joint differential rates with appellant barge lines	22
B. The joint barge-rail rates sought by appellant barge lines are not required in order to carry out the National Transportation Policy	39
II. Discrimination prohibited by section 3 (4) of the Act does not result when a railroad demands its full local rate on traffic received from a barge line connection while accepting as compensation a lesser amount, in the form of a division of a joint through rate on such traffic received from a rail connection, under a joint rate agreement	50
CONCLUSION	65
APPENDIX (Pertinent provisions of the Statute)	66

57717—65——1

TABLE OF CASES CITED

	Page
Acme Mills v. *Director General*, 81 I. C. C. 492	51
Alabama Great Southern R. Co. v. *United States*, 88 F. Supp. 982, affirmed 340 U. S. 216	30, 48
Algonquin-Missouri Chemical Corp. v. *A., T. & S. F. Ry. Co.*, 286 I. C. C. 307	28
Ann Arbor R. R. Co. v. *B. & O. R. R. Co.*, 136 I. C. C. 578	36
Bituminous Coal to Youngstown, 163 I. C. C. 3	19, 59
Board of Trade of Troy, Ala. v. *Ala. Mid. Railway Co.*, 6 I. C. C. 1	19, 59
Brimstone R. R. Co. v. *United States*, 276 U. S. 104	57
Carr v. *Yokohama Specie Bank, Limited*, 200 F. 2d 251	64
Chase & Co. v. *New York Central R. Co.*, 161 I. C. C. 614	18, 51
Chicago & N. W. Ry. Co. v. *Osborne*, 52 F. 912	62
Chicago, M. & St. Paul Ry. Co. v. *Union Pac. R. Co.*, 88 I. C. C. 312	38
Chicago, R. I. & P. Ry. Co. v. *United States*, 274 U. S. 29	27
Decatur Navigation Co. v. *Louisville & Nashville R. Co.*, 31 I. C. C. 281	34
Denver & R. G. W. R. Co. v. *Union Pac. R. Co.*, 287 I. C. C. 611	12, 13, 32, 33
Dillner (W. J.) Transfer Co. v. *United States*, 101 F. Supp. 506, affirmed 344 U. S. 883	53
Empire Steel & Iron Co. v. *Director General*, 56 I. C. C. 158	27, 38
General Transportation Co. v. *United States*, 65 F. Supp. 981, affirmed 329 U. S. 668	18, 53
Georgia & F. R. v. *Atlantic Coast Line R. Co.*, 191 I. C. C. 489	27, 45
Grain Proportionals, Ex-Barge to Official Territory, 246 I. C. C. 353	44
Helvering v. *Tex.-Penn Oil Co.*, 300 U. S. 481	53
Inland Navigation Co. v. *Big Creek & Telocaset R. Co.*, 281 I. C. C. 515	28
Inland Waterways Corp. and Other Common Carriers, 153 I. C. C. 129	28
Interstate Commerce Commission v. *Delaware, L. & W. R. R.*, 220 U. S. 235	13
Interstate Commerce Commission v. *Mechling*, 330 U. S. 567	16, 18, 40, 43, 44, 48, 60
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457	13
Mitchell Coal Co. v. *Penna. R. R. Co.*, 230 U. S. 247	13
New York Dock Ry. v. *Baltimore & O. R. Co.*, 32 I. C. C. 568	38
Nicholson Universal & S. Co. v. *Pennsylvania R. Co.*, 203 I. C. C. 637	30
Pacific Navigation Co. v. *Southern Pacific Co.*, 31 I. C. C. 472	35
Parsons v. *Chicago & Northwestern Ry.*, 167 U. S. 447	19, 59
Pennsylvania R. R. Co. v. *United States*, 54 F. Supp. 381	28
Pennsylvania R. R. Co. v. *United States*, 236 U. S. 351	13
Rail and Barge Joint Rates, 270 I. C. C. 591	29
Robinson v. *Balt. & Ohio R. R.*, 222 U. S. 506	13

	Page
Schilling v. *Schwitzer-Cummins Co.*, 142 F. 2d 82	64
St. Louis S. W. Ry. Co. v. *United States*, 245 U. S. 136	24, 51
Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197	59
	58
Texas & Pacific Ry. Co. v. *United States*, 289 U. S. 627	27, 45
Thompson v. *United States*, 343 U. S. 549	61, 62
Tozer v. *United States*, 52 F. 917, cert. den. 146 U. S. 358	64
United States v. *Capital Transit Co.*, 338 U. S. 286	27
United States v. *Great Northern Ry. Co.*, 343 U. S. 562	18, 53
United States v. *Hancock Truck Lines, Inc.*, 324 U. S. 774	38
United States v. *Illinois Central R. R. Co.*, 263 U. S. 515	13
United States v. *Louisville & Nashville R. R. Co.*, 335 U. S. 314	18, 53
United States v. *Tucker Truck Lines*, 344 U. S. 33	37
United States War Department v. *A. & S. Ry. Co.*, 92 I. C. C. 528	
Virginian Ry. Co. v. *United States*, 272 U. S. 658	38
Western Pacific R. R. Co. v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127	27, 45, 57
Western Pacific R. R. Co. v. *Southern Pacific Co.*, 55 I. C. C. 71	18, 55
White Star Line v. *N. Y. C. R. Co.*, 83 I. C. C. 473	36
Wool Rates Investigation, 1923, 120 I. C. C. 493	27

STATUTES

28 U. S. C. 1253, 2101(b) and 2325	2
Interstate Commerce Act, as amended, (24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*):	
National Transportation Policy	66
Section 1	10, 66
Section 3(4)	10, 67
Section 15(1)	68
Section 15(3)	24, 69
Section 15(4)	70
Section 15(6)	56, 71
Section 307(d)	10, 25, 72

28 U. S. C. 1253, 2101 (b) and 2325. Probable jurisdiction was noted October 10, 1955 (R. 152).

QUESTION PRESENTED

The questions involved in this appeal are:

1. Whether the failure and refusal of a railroad to establish and maintain through routes and joint rates with a water carrier, while participating in such routes and rates with another rail carrier, is a violation of sections 3 (4) or 307 (d) of the Interstate Commerce Act (49 U. S. C. 3 (4)).

(a) Whether the joint barge-rail rates sought by the appellant barge lines are required in order to carry out the National Transportation Policy, and was the Commission required to find that such rates are necessary or desirable in the public interest.

2. Whether the discrimination prohibited by section 3 (4) of the Act results when a railroad demands its full local rate on traffic received from a barge line connection while accepting as compensation for a similar service a lesser amount, in the form of a division of a joint through rate on such traffic received from a rail connection, under a joint agreement.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act involved are set forth in the Appendix, *infra*, pp. 66–72.

STATEMENT

This is a direct appeal from a final judgment of a specially constituted District Court, sustaining a report and order of the Interstate Commerce Commission issued in a proceeding entitled No. 30731, *American Barge Line Company et al. v. Chicago & Eastern Illinois Railroad Company* (R. 46–55).[1]

The complaint against the railroads was filed with the Commission on December 31, 1950. It alleged that the refusal of the intervening appellee railroads to establish and maintain reasonable through routes and joint rates on sulphur with appellant water carriers from Galveston, Texas, to Danville, Illinois, is in violation of sections 1 and 307 (d) of the Interstate Commerce Act; and that these railroads are maintaining rates and charges which are discriminatory against appellants, in violation of section 3 (4) of the Act. The Commission was asked to require the railroads to cease and desist from the alleged violations, and to establish such barge-rail routes and joint rates on sulphur from Galveston to Danville as the Commission may deem to be rea-

[1] The complaint was filed by the American Barge Line Company, Federal Barge Lines, Coyle Lines, Inc., and Dixie Carriers, Inc., operating over through water routes between Galveston, Texas and East St. Louis, Illinois, against the Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company and the Wabash Railroad Company, operating between East St. Louis, Illinois, and Danville, Illinois.

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court of three judges is reported at 129 F. Supp. 28 (R. 46–55). The report of Division 3 of the Interstate Commerce Commission is reported at 287 I. C. C. 403 (R. 22–28). The report of the entire Commission on reconsideration is reported at 291 I. C. C. 422 (R. 29–35).

JURISDICTION

The final judgment of the district court was entered February 16, 1955 (R. 55). Appellants' motion for a new trial was denied by order of the district court on March 28, 1955 (R. 60). Notice of appeal was filed on May 17, 1955 (R. 1). The jurisdiction of this Court is invoked under

sonable and just and otherwise lawful (R. 62–64).

Following a hearing before a Commission examiner a proposed report was issued. In the report the examiner recommended that the Commission find the combination barge-rail rate applicable on sulphur from Galveston, interchanged by the barge lines to rail carriers at the port of East St. Louis for movement to Danville, is unreasonable; that the rail carriers, by accepting less than their local rate on sulphur, interchanged with rail connections at East St. Louis for movement to Danville, while charging the full local rate on traffic interchanged to them from appellant barge lines, constitutes discrimination in violation of section 3 (4) of the Act (R. 10–21).

Division 3 of the Commission did not follow the recommendation of the examiner. It found that (1) the evidence did not warrant a finding that the present through barge-rail rate is unreasonable or otherwise unlawful, and afforded no basis for a finding of unlawful discrimination under section 3 (4) of the Act; and (2) that the establishment of through routes and joint rates, as sought, is not shown to be necessary or desirable in the public interest (R. 22–28). These findings were sustained by the entire Commission on reconsideration (R. 29–35).

FACTS FOUND BY THE COMMISSION

The American Barge Line and the Federal Barge Lines, Inc., engage in common carrier

service by barge on the Mississippi River, serving among others the ports of New Orleans and Port Sulphur (about 60 miles south of New Orleans) (R. 77), on the one hand, and East St. Louis, Ill., on the other. The Coyle Lines, Inc., and Dixie Carriers, Inc., operate a common carrier barge service from Galveston, Texas, to New Orleans via the Intracoastal Canal and join with the American and Federal barge lines in rendering service on the Mississippi River in the publication of through routes and joint barge-rates on sulphur from Galveston to East St. Louis. The distance by water from Galveston to New Orleans is 357 miles and from New Orleans to East St. Louis it is 1,049 miles, or a total distance of 1,406 miles (R. 23).[2]

The sulphur involved herein originates at mines located in southeastern Texas, at such points as New Gulf, about 60 miles from Galveston (287 I. C. C. 405), and any shipment utilizing barge service would have to be moved by rail from the mine to Galveston and there transferred to barge. After movement by water to East St. Louis the sulphur would have to be transferred from barge to rail for the final leg of the journey to Danville.

The railroads can and do transport the sulphur the entire distance from the mines to Danville,

[2] The rail distance from East St. Louis to Danville, Illinois, is 184 miles, which makes the barge-rail distance from Galveston to Danville 1,590 miles.

which is approximately 1,034 miles. The sulphur originating at the Texas mines moves by rail to East St. Louis and there is delivered to the intervening appellee railroads for movement to Danville. Approximately 20,000 tons of sulphur moves annually from the mines in the Galveston area to Danville but no part of the movement has been made over the barge lines involved. There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. This traffic was not handled by appellee barge lines but by a contract water carrier which has discontinued operations. At present the sulphur is moving over all-rail routes from origin to destination (R. 24). There are no joint barge-rail rates in effect from Galveston to Danville or to any other point.

The combination all-rail rate on sulphur from the mines or from Galveston to Danville is $11.686 (comprised of $8.736 from the mines, or Galveston, to East St. Louis, plus the local rate of $2.95 from East St. Louis to Danville), while the combination barge-rail rate from Galveston to Danville is $8.27 (comprised of $5.32 from Galveston to East St. Louis by barge, plus the local rail rate of $2.95 from East St. Louis to Dan-

ville).[3] This makes a differential in favor of the Barge lines of $3.416. The all-rail joint through rate, from the mines or from Galveston of $9.184, is to be compared with the combination barge-rail rate of $8.27, or a differential in favor of the barge lines of 91.4 cents.

In order to obtain a part of the sulphur movement the barge lines requested the Commission to approve the establishment of a joint barge-rail rate of $7.67 (in lieu of the combination barge-rail rate of $8.27) to be divided on the basis of $5.41 for the barge lines, and $2.26 for the rail lines. This proposed division of $5.41 would exceed the present barge rate from Galveston to East St. Louis by 9 cents per ton (R. 24–25).

The Commission found that the record did not justify a finding that the present combination barge-rail rate, 91.4 cents lower than the present joint all-rail rate ($9.184—$8.270=91.4 cents) is

[3] As the Commission pointed out (R. 22) the price of sulphur at Galveston is $1.50 per ton higher when loaded in barges than when loaded in rail cars at the mines. This higher price reflects, in part, the rail rate of $1.10 from the mines to Galveston, and the unloading from cars to storage bins, transfer from bins to barges, wharfage, stevedoring, and pier rental (R. 23).

The barge lines do not absorb any portion of the cost of transporting the sulphur from the mines to, and loading it in, the barges at Galveston. However, they do absorb from the joint barge rate of $5.32 the cost of switching the loaded cars from the barge terminal at East St. Louis which amounts to approximately 30 cents per ton (R. 12), and are willing to absorb the charges incident to transfer to rail cars at E. St. Louis (R. 24).

unreasonable (R. 30). It also found that the evidence did not afford a basis for a conclusion that the proposed difference sought by appellants (differential) of $1.514 ($9.184–$7.670=$1.514), between the present all-rail rate from Galveston, and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against the barge lines (*id.*). The Commission further found that the record before it did not warrant a finding that the present barge-rail rate was unreasonable or otherwise unlawful for the service offered and afforded no basis for a finding of unlawful discrimination under section 3 (4) of the Act (R. 26–27).

CONTENTIONS OF APPELLANTS

Appellant barge lines contended in the Commission proceedings that their proposed joint barge-rail rate from Galveston to Danville of $7.67 (to be divided $5.41 for the barge lines and $2.26 for the rail lines) would be on a reasonable basis and should be made in view of the fact that the railroads' division of the joint barge-rail rate (previously established and now in effect) from Port Sulphur to Danville is $2.26 (R. 25).

Appellant barge lines further contended that the failure and refusal of the appellee railroads to establish and maintain joint through routes and rates on sulphur from Galveston to Danville with the barge lines, with "reasonable" differentials under the all-rail rates, is discriminatory

against them as connecting carriers and in favor of the connecting carriers by railroads with which they participate in through all-rail routes and joint rates, and is a violation of section 3 (4) of the Act (R. 22).

PROCEEDINGS IN COURT BELOW

Appellant barge lines filed suit against the United States and the Interstate Commerce Commission to enjoin and set aside the order of the Commission (R. 3–9). The Commission filed its answer to the complaint (R. 36–38) and the railroads, having been permitted to intervene as defendants (R. 40–41), filed their joint answer seeking to uphold the Commission's order (R. 39–40). The United States, assuming a neutral position in the case, filed its answer, neither admitting nor denying the allegations of the complaint (R. 35). The United States has joined the barge lines in this appeal and now seeks to have this Court reverse the decision of the court below, which, without dissent, upheld the findings and conclusions of the Commission. Probable jurisdiction was noted by this Court on October 10, 1955 (R. 152).

SUMMARY OF ARGUMENT

I

What the appellant barge lines sought in their complaint before the Commission was the establishment of through joint barge-rail routes and

rates with "reasonable" differentials under the all-rail joint rates, on sulphur from Galveston, Texas, to East St. Louis via barge and thence to Danville, Illinois, via rail. Specifically, the complaint before the Commission alleged only that appellee railroads had failed to establish reasonable through routes and joint rates with the barge lines in violation of section 1 (4) (which makes it the duty of the railroads to establish reasonable through routes and rates with other railroads and with common carriers by water), and section 307 (d) (which requires the Commission to prescribe through routes and joint rates for the transportation partly by rail and partly by water when found to be in the public interest), and with maintaining rates and charges discriminatory against the barge lines in violation of section 3 (4) (which prohibits discrimination between connecting carriers, including water carriers). These allegations thus constituted the issues in the Commission proceedings. The contention of the barge lines now appears to be that the relief they seek can be granted under section 3 (4). It is readily apparent that the provisions of section 3 (4) do not authorize or empower the Commission to compel through routes and joint rates, differential or otherwise.

With respect to these issues, it must be pointed out that the only power of the Commission to establish through routes and joint rates is to be found in sections 15 (3) and 307 (d) of the Act.

This power is limited. The Commission can do so only under either of these sections, after a full hearing followed by a finding that such routes and rates are necessary or desirable in the public interest. Its power to prescribe a differential rate favorable to a water carrier is limited by the provisions of section 307 (d) to instances where through rail-barge routes already exist and then only when, after hearing, it is able to find that such rates are "justified" and are "necessary or desirable in the public interest." The Commission found that the establishment of through routes and joint differential rates, as sought, is not shown to be necessary or desirable in the public interest. This finding is supported by substantial evidence which is not in dispute in this appeal. It is understood from the brief of appellant barge lines (pp. 11–12) that they are seeking review only of the issue of alleged discrimination under section 3 (4) of the Act.

II

Having failed in their effort to prove that through routes and joint rates were necessary or desirable in the public interest under section 307 (d), as they set out to do before the Commission, the barge lines have changed their theory of the case by contending now that discrimination exists under section 3 (4) as a matter of fact, and of law, because appellee railroads refuse to enter into joint rates on as favorable a basis with the

barge lines as the joint all-rail rate level which they maintain with their connecting rail lines. The issues raised by these appellants in their complaint before the Commission cannot be severed from the Commission's decision and must be reviewed as a whole on this appeal. They form the basis of both the Commission's decision and that of the district court.

In their attempt to prove discrimination, the barge lines rely on the decision of the Commission in the *"Ogden Gateway" case* (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611). That case is readily distinguishable. There the Union Pacific had established the same joint rates with the Bamberger Railroad as applied to numerous other railroads but refused to do so with the Rio Grande, which wanted equal rates with the others. In the instant case the barge lines want more than joint equal rates. They want a particular rate—one that would be lower by the amount of the division of the joint through all-rail rate.

Furthermore, the *"Ogden Gateway"* case admittedly involved other and greater issues. Although the Commission's decision in that case was affirmed by the district court as to this and some other issues raised, yet the court reversed the Commission as to still other issues. The appeals taken to this Court from that decision have not as yet been determined. (October 1955 Term, Nos. 117–119, 332–334.)

The other decisions cited and relied upon by the barge lines to prove discrimination under section 3 (4), are likewise distinguishable. Each case must stand on its own facts. The Commission, in the instant case, found from the evidence that a violation of section 3 (4) had not been shown. Under different facts and under different circumstances, it was found in the *Ogden Gateway* case that there was a violation of section 3 (4). This Court has held in a number of cases, including *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506, and *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, that whether differences in rates result in unjust discrimination is a question of fact for the determination of the Commission. What amounts to undue preference or prejudice or discrimination is a question of fact with which the Commission was created to deal, not one of law. *United States* v. *Louisville & Nashville R. R. Co.*, 335 U. S. 314, 320; *Pennsylvania R. R. Co.* v. *United States*, 236 U. S. 351, 361; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 255. A finding that discrimination is unjust is a finding of fact. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481.

There is no merit to appellants' claim that the Commission has misconstrued or misapplied the provisions of section 3 (4) of the Act, in reaching its ultimate conclusions in this case.

III

The argument of appellant United States that joint barge-rail rates are necessary to carry out the National Transportation Policy, and that the Commission was required under section 307 (d) of the Act to find that the establishment of such rates were "necessary or desirable in the public interest," is without substance. The suggestion that the barge lines have an "inherent advantage" over the railroads with respect to the movement of the sulphur here involved, is not supported by the record.

The fact is that the railroads can and do transport sulphur the entire distance from the Texas mines to Danville, Illinois. The originating southwest rail carriers move the sulphur to East St. Louis, Illinois, where it is interchanged with appellee rail lines for movement to Danville. The interchange at East St. Louis involves merely the switching of the cars from one railroad to another. No transfer of lading is involved.

In order to utilize the proposed barge-rail route, it would be necessary to move the sulphur by rail from the mines to Galveston, where it would have to be unloaded from rail car to storage bin and loaded from storage bin to the barge. After the barge movement to East St. Louis, it again would be necessary to unload the sulphur from the barge and load it into rail cars. Obviously this would entail wasteful transportation.

Under these circumstances it is difficult to see how the barge lines could have an "inherent advantage" over the railroads on the sulphur traffic. The "inherent advantage" contemplated by the National Transportation Policy preponderates in favor of the railroads. The Commission considered such circumstances and found that the National Transportation Policy did not require it to compel the railroads, that originate the traffic, to relinqish their long haul (over 1,000 miles) to the barge lines and accept instead a short haul of only 240 miles (60 miles from the mines to Galveston and 180 miles from East St. Louis to Danville) in favor of a barge haul of 1,400 miles from Galveston to East St. Louis over a circuitous route.

It has never been, and is not now, the policy of Congress, as reflected in any declaration or in any statute enacted by it, to require rail carriers to surrender their "natural advantages" in order to favor water carriers. On the contrary, Congress intended in all of its pronouncements to preserve such advantages.

The argument of the barge lines and the United States is that the Commission must compel appellee railroads to enter into "reasonable" joint differential rates with the barge lines (although the combination barge-rail rate of $8.27 is lower by $3.41 than the combination all-rail rate of $11.68, and lower than the joint all-rail rate of $9.184 by 91.4 cents per ton) merely because the

cost of barge carriage, as compared with that of the railroads, is cheaper. They argue that the savings in costs must be passed on to those who ship by barge. In support of this argument they rely on this Court's decision in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. That case clearly is distinguishable and is not controlling.

The *Mechling* case was concerned with proportional rates paid by the shipper, as one of the components of a combination rate, which were higher on ex-barge grain than on ex-rail grain. The grain traffic there concerned moved over through routes and at proportional rates. There were no single factor rates involved or any question of divisions of joint rates. This Court, on the facts in that case, found that the rates approved by the Commission, higher on ex-barge than on ex-rail or ex-lake, were discriminatory and that such rates prevented the preservation of the "inherent advantages" of water transportation in violation of the National Transportation Policy. That was the main holding in the case.

The "inherent advantages" found by this Court to favor the barge lines in the *Mechling* case certainly cannot be found to favor the barge lines in the instant case. The legislative history fully supports this view. There is nothing in the National Transportation Policy that would require the Commission to make any findings different from those it has made in the instant

case. Neither is there anything in section 307 (d) that requires the Commission to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established and differential rates fixed in order to take the sulphur away from the railroads and turn it over to the barge lines.

IV

Appellant barge lines have further changed the theory of their case, as relied upon in the Commission proceedings, by now contending that discrimination prohibited by section 3 (4) of the Act results when appellee railroads demand their full local rate of $2.95 on ex-barge sulphur received at East St. Louis for movement to Danville, while accepting as compensation from their rail connections at that point a lesser amount in the form of a division of a joint through rate. This contention is without substance. Under this theory a division of a joint all-rail rate would be the same thing as a rate or charge to be treated the same as a published rate or charge paid by a shipper.

First, the issue of whether divisions of joint rates between carriers, are rates within the meaning of section 3 (4) of the Act, was not raised by the complaint before the Commission or relied upon by the barge lines. The record shows that at the oral argument of the case before the Com-

mission counsel for the barge lines stated that he did not think this was one of the issues of the complaint because the barge lines were seeking joint through rates "to cure the discrimination." Therefore, since the question was not actually raised by the complaint before the Commission, and if raised was not pressed, but in fact waived, it should not be considered upon review. *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774; *General Transportation Co.* v. *United States*, 65 F. Supp. 981, affirmed *per curiam* 329 U. S. 668; *United States* v. *Tucker Truck Lines*, 344 U. S. 33.

Even assuming that this issue was properly before the Commission, it is well settled that a division of a joint through rate is not a "rate" or "charge" as those terms are used in section 3 (4) of the Act. Therefore, a finding of discrimination could not be based on that section. The Commission distinguished the terms divisions and rates in its report on reconsideration, pointing out that the comparison between them is of unlike things. Divisions of joint rates are the results of contractual arrangements between carriers, and are not required to be published. *Chase & Co.* v. *New York Central R. Co.*, 161 I. C. C. 614. The cases of *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, and the *Mechling* case, *supra*, relied upon by the barge lines, are distinguished by the Commission and are not controlling.

The distinction between rates and divisions of joint rates is further emphasized by the fact that when Congress amended section 15 of the Interstate Commerce Act in 1920, giving the Commission for the first time definite powers over divisions of joint rates (which theretofore had been uncertain), it set forth in section 15 (6) certain standards or criteria by which the Commission was to be governed in prescribing divisions. Before such divisions may be challenged an appropriate action would have to be instituted under the provisions of that statute.

The Commission has held uniformily that a comparison of a division of a joint rate or a local rate is not a proper test of either. *Board of Trade of Troy, Ala.* v. *Ala. Mid. Railway Co.*, 6 I. C. C. 1; *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12. This Court held in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 457, that the fact a portion of a through joint rate received by one of the carriers, party thereto, may be less than its local rate, is not questioned.

The claim of appellant barge lines that the district court did not pass upon the question of whether a division of a joint rate is a rate, within the meaning of section 3 (4) of the Act, or upon the question of discrimination under that section, is without merit as that court specifically found that "When the whole record is considered in the light of all the provisions of the Act, and many cases construing same, we think Plaintiffs have

not shown their claim of discrimination to be meritorious." (129 F. Supp., pp. 28.)

ARGUMENT

I

The failure and refusal of the railroads to establish through routes and joint differential rates with appellant barge lines is not a discrimination prohibited by Section 3 (4) of the Act nor a violation of Section 307 (d), or in contravention of the National Transportation policy

As we understand the appeal, appellant barge lines do not here question the "fact as to reasonableness and public interest, questions as to which appellants did not assert error within the scope of judicial review," in their suit in the court below. (Jurisdictional Statement, p. 9.) As shown in the Statement, p. 8, appellants there "sought judicial review only as to the correctness of the Commission's construction of section 3 (4) of the Act." No review was sought with respect to the allegation of reasonableness of the rail rates or the establishment of through routes. In their brief in this Court the barge lines state (pp. 11–12) that "no further note" will be taken "of those allegations nor of the proof with respect thereto," but instead the brief will primarily be concerned "with the issue of alleged discrimination between connecting carriers in violation of section 3 (4)."

Appellant barge lines challenge the validity of the order, here under review, only on two

grounds: First, that the order is discriminatory in fact and as a matter of law, under section 3 (4) of the Act, because it approves the refusal of the appellee railroads to enter into joint rate arrangements with the appellant barge lines while joining in such arrangements with connecting railroads; and second, that the order is discriminatory in fact, under section 3 (4), because it permits the appellee railroads to accept from their connecting rail lines, as compensation for the same or similar service, a lesser amount in the form of a division of joint rates than they demand and receive from connecting barge lines on shipments of sulphur. (Barge Lines' Brief, pp. 23 and 34, respectively.) Included in the first proposition is the issue of whether the Commission was required, under the evidence of this case, to establish differentials in the barge-rail rates under the all-rail rates. The second proposition involves the question of whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in section 3 (4) of the Act.

In supporting the first of the two grounds upon which the barge lines rely for reversal of lower court, the appellant United States takes the position, in its brief (p. 18 et seq.), that the railroads' refusal to establish "joint rail-barge rates" resulted in reducing the barge lines' "inherent advantages" and, therefore, the Commission is required to find that the establishment of

such rates is "necessary or desirable in the public interest" under section 307 (d) of the Act, regardless of whether or not a shipper supported the barge lines' request for such rates, or appeared and testified.

A. The Commission's order does not violate Section 3 (4) of the Act in failing to require appellee railroads to enter into through routes and establish joint differential rates with appellant barge lines

The first question attempted to be raised by appellant barge lines on this appeal (brief, p. 23) is whether it is unlawful, under section 3 (4) of the Act, for a railroad, while participating in through routes and joint rates with another connecting rail carrier, to refuse to participate in similar routes and rates with a connecting water carrier, seeking to engage in the same through transportation. In dealing with this question these appellants take the position that it is unlawful per se, under section 3 (4) of the Act, for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line (*id.*).

As heretofore pointed out the relief the barge lines sought before the Commission apparently was the establishment of through routes and joint rates as a means of removing the alleged discrimination (*supra,* p. 3). The barge lines now contend that the relief they seek can be granted under section 3 (4) of the Act. They are mistaken in this contention. It is readily apparent

that the provisions of section 3 (4) do not authorize the Commission to compel through routes or joint rates, differential or otherwise. Section 3 (4) prohibits carriers subject thereto from discriminating in their "rates, fares, and charges between connecting lines," including carriers by water subject to Part III of the Act. The word route is not mentioned in that section.

We do not mean to say that the Commission may not require the removal of discrimination when found to exist under section 3 (4). The procedure by which this is done is by issuing an order directing the carrier to remove the discrimination, and if the carrier fails to do so then the Commission may prescribe a reasonable nondiscriminatory rate under section 15 (1). But the Commission may make such an order in either case only after hearing and upon a finding supported by substantial evidence. There was a hearing in this case at which evidence was presented, from which the Commission found that the allegation of discrimination had not been sustained.

But the complaint of appellant barge lines before the Commission charged only that appellee railroads had failed to enter into through routes and reasonable joint rates with the barge lines, in violation of sections 1 and 307 (d) of the Act, and that the railroads were maintaining rates that are discriminatory against the barges in vio-

lation of section 3 (4) (R. 63, 64).[4] Pursuant to that prayer the Commission conducted an investigation and held a hearing and considered appellant's request that the railroads be required to establish "such through routes and joint rates, as the Commission may deem reasonable and just." (*id.*)

From the foregoing, it is believed clear that the question actually raised on the record is whether the Commission erred in finding that (1) the evidence before it would not warrant a finding that the present through barge-rail rate is unreasonable, and affords no basis for a finding of unlawful discrimination under section 3 (4) of the Act, and (2) that the establishment of through routes and joint rates as sought are not necessary or desirable in the public interest. The order actually sought was under sections 1 and 307 (d). See *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136, 145.

With respect to the issues before the Commission we must point out that the only power of the Commission to establish through routes and joint rates is to be found in sections 15 (3) and 307 (d) of the Act.[5] It will be observed

[4] This reference to discrimination in charges relates to the allegation that the railroads refuse to establish through routes and joint rates with the barge lines.

[5] Section 15 (3) of the act provides in applicable part: The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative with-

from the provisions of section 15 (3) as well as section 307 (d), that the Commission's power to prescribe through routes and joint rates is limited. It can do so only under these sections when it finds after a full hearing that such routes and rates are necessary or desirable in the public interest. In connection with the provision under section 307 (d) the Commission is only required "In the case of a through route, where one of the carriers is a common carrier by water," to prescribe "such reasonable dif-

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out complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *

Section 307 (d) of the act provides in part:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * *

ferentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water," when found to be in the public interest. The Commission could not prescribe differential rates sought by the barge lines because of the absence of through routes. In any event the record shows that there was no evidence introduced by any shipper that either through routes or joint differential rates were necessary or desired (R. 25, 31).[6]

In the absence of substantial evidence the Commission could not require through routes and joint differential rates. In any event, before joint rates could be prescribed through routes must be established except that a joint rate could be prescribed over a claimed through route when the Commission determines it could have required the carriers to establish a through route originally or if it is necessary or desirable in the public interest. *Western Pac. R. R. Co.* v. *Northwestern*

[6] The statement at page 9 of appellant barge lines' brief that "At the request of the shipper, the appellants asked the railroad appellees to join them in a joint barge-rail rate on sulphur from Galveston to Danville" is of no evidentiary value in proving public interest. Neither does the statement at page 10 of their brief, that "the shipper advised that under the proposed barge-rail rate the barge lines would get some sulphur from Galveston", aid in proving such interest. Such hearsay evidence is relied upon by the United States in its brief at p. 14 as proving public interest. Neither this shipper nor any other shipper offered any testimony in the case.

Also the Commission found (R. 30) that there was no evidence that any differential is required to remove the alleged discrimination.

Pac. R. Co., 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line, ibid.*, 489, 499. While through routes may exist without joint rates the converse is not true. *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562, 573; *Thompson* v. *United States*, 343 U. S. 549, 558.

In applying Section 307 (d) to the instant case that section must be considered in connection with Section 15 (3). Therefore, before the Commission can prescribe the joint differential rate and through route sought by plaintiffs under these sections the evidence must show that such relief is "necessary or desirable in the public interest." *Chicago, R. I. & P. Ry. Co.* v. *United States*, 274 U. S. 29, 36. No such showing was made in this case.

The Commission held in the very early case of *Empire Steel & Iron Co.* v. *Director General*, 56 I. C. C. 158, that whether joint rates must be ordered, established, and maintained, depends upon such matters as public demand or necessity and whether or not the absence of joint rates is detrimental or obstructive to the public interest. In *Wool Rates Investigation, 1923*, 120 I. C. C. 493, the Commission held that the public interest must be considered broadly; that the interests of producers, consumers, and carriers must all be considered. Although the decisions in these cases pertain to railroads, they are equally applicable to water carriers.

In *Inland Waterways Corp. and Other Common Carriers*, 153 I. C. C. 129, among others, the Commission held that its power to require through routes and joint rates in connection with barge lines is limited to cases in which it deems such rates and routes are necessary and desirable in the public interest.[7] See also *Inland Navigation Co.* v. *Big Creek & Telocaset R. Co.*, 281 I. C. C. 515.

The instant case is on all fours with the *Algonquin-Missouri Chemical Corp.* v. *A. T. & S. F. Ry. Co.*, 286 I. C. C. 307 (cited by both Division 3 (R. 26) and the entire Commission (R. 30–31)), wherein it was found that the establishment of a joint differential barge-rail rate on sulphur from Port Sulphur to DeSoto, Kans., was not shown to be necessary or desirable in the public interest (under almost identical allegations, facts and issues as here) and that the allegation there made of discrimination under Section 3 (4) of the Act, had not been sustained, although a shipper supported the complaint. As pointed out by the Commission (R. 26–27), the provisions of Section 307 (d) require it to prescribe joint rates for the transportation partly by rail and partly by water in instances where it is shown that such rates are necessary or desirable in the public interest.

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[7] In its interpretation of the meaning of the words "consistent with the public interest," as contained in the proviso of Section 15 of the Act, the Three Judge Court in *Pennsylvania R. R. Co.* v. *United States*, 54 F. Supp. 381, 390, held that the words "public interest" as used

In *Rail and Barge Joint Rates*, 270 I. C. C. 591, the Commission conducted an extensive investigation (covering a period of years) into the barge-rail rate structure. Its order entered therein, made pursuant to Section 307 (d), required common carriers by railroads and water to establish joint through routes for the transportation of property described in the report, and to establish, maintain and apply over such through routes the joint rates prescribed based upon certain differentials which it found to be justified. However, the Commission refused to require through routes and joint rates on bulk commodities, such as sulphur, saying (p. 618):

> Bulk commodities are largely handled in all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities.

The Commission's order in that case was challenged in court but was sustained by the District

refers to "the shipping public," and fairly interpreted "must be taken to include also considerations of railroad operating efficiency and economy." The Supreme Court approved this interpretation in its opinion on appeal of this case in 323 U. S. 588, 592–593.

Court in *Alabama Great Southern R. Co. v. United States*, 88 F. Supp. 982, and affirmed by the Supreme Court of the United States in an opinion found in 340 U. S. 216.

It is submitted that there is no more reason for making a different holding in regard to through routes and joint rates with differentials on a bulk commodity in the instant case than there was in the *Rail and Barge Joint Rates* case.

While the Commission's power to establish through routes and joint rates have been greatly extended since the enactment of the original act, the wording of section 3 (4) has remained substantially the same. The statutes presently applicable and in effect governing through routes and joint rates, including section 307 (d), do not authorize the Commission to establish such routes and rates unless the evidence shows that they are necessary or desirable in the public interest. Section 3 (4) does not apply for the purpose of establishing through routes, and it does not include within its terms any reference to routes. *Nicholson Universal & S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, 674.

As heretofore stated the barge lines sought through routes and joint differential rates before the Commission. They now contend that the Commission should prescribe something more than a joint rate (the railroads' joint rate is $9.184) as that would not be sufficient for their purpose. They desire to retain their local rate

of $5.32 from Galveston to East St. Louis and have the Commission prescribe a particular joint barge-rail rate of $7.67 from Galveston to Danville which they contended should be divided on the basis of $5.41 for the barges and $2.26 for the rail lines.

Having failed in their effort to prove that through routes and joint rates were necessary and desirable in the public interest under section 307 (d), as they set out to do before the Commission, the barge lines now change their theory of the case by contending that discrimination exists under section 3 (4) as a matter of fact and law. Their argument is that when appellee railroads refuse to enter into joint rates with the barge lines, while joining in such rates with connecting railroads, there is discrimination *per se*, because the combination rate applicable on the barge-rail traffic is not on as favorable a basis as the joint all-rail rate level in relation to the all-rail combination of local rates. The discrimination upon which the barge lines now rely is grounded upon the claim that the separately established rate paid by the shipper, on ex-barge sulphur beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis with respect to ex-rail sulphur moving from the same origin to the same destination. We shall show in subheading B of this

chapter, *infra*, that this contention is wholly untenable.

Appellants rely on the Commission's decision in the so-called *Ogden Gateway* case (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611) in attempting to prove that the mere fact that the appellee railroads refused to join the barge lines in joint rate arrangements, while extending them to connecting rail lines under similar conditions, resulted in discrimination in violation of section 3 (4) of the Act. That case is distinguishable.[5] There the Union Pacific had established the same joint rates with the Bamberger Railroad as applied to numerous other

[5] In that case the Commission stated (287 I. C. C. 619) that the paramount issue was whether the Ogden gateway should be made available to shippers for routing at joint rates equal to those over competitive routes of all traffic in connection with the Rio Grande between the areas involved, and that this issue falls within the limitations of section 15 (3) and (4). In addition, it stated, that evidence was presented bearing upon the issues of reasonableness of the assailed rates, discrimination between connecting lines for refusal of the Union Pacific to join in lower joint rates and undue prejudice against shippers using the Ogden gateway routes. It also stated, "These issues are closely related and will be considered together."

The Commission then found (p. 658) that there was "no substantial evidence as to transportation conditions over the established routes referred to" and that "a finding of discrimination under section 3 (4) of the Act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes alleged to be preferred." It then stated that "No such showing has here been made."

rail carriers but refused to do so with the Rio Grande, which wanted equal rates with the others. In the instant case the barge lines want more than joint rates. They seek a rate that would be lower than the joint all-rail rate—one that would be at least lower by the amount of the division between the rail carriers of the joint through rate.[9]

The Rio Grande was seeking joint rates. In the instant case differential rates were sought which could only be authorized pursuant to the provisions of section 307 (d) of the Act. That section provides that "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified." Therefore, it can only prescribe differentials in case *through routes exist,* and then only after it finds that the evidence warrants it.

Although the decision of the Commission in the *Ogden Gateway* case, admittedly involving other and much greater issues, was affirmed by the three-judge district court of Nebraska, inso-

[9] If rates could be predicated on the amounts of divisions of joint through rates, agreed upon by the carriers, subject to Commission approval under section 15 (6) (which must take into consideration several factors such as the efficiency of the carriers, the amount of revenue required to pay their operating expenses and the importance to the public of the transportation service of such carriers) the rate structures would be undermined because of the differing amounts of such divisions.

far as this particular issue was concerned, it was reversed as to some of the other issues. An appeal has been taken from the decision of this Court, October 1955 Term (Nos. 117-119, 332-334), which has not yet been argued.

The other Commission decisions cited and relied upon by appellant United States to prove that the failure of the railroads in the instant case to establish through routes and joint rates was discriminatory (Br. p. 33) are distinguishable from the instant case. In *Decatur Navigation Co.* v. *Louisville & Nashville R. Co.*, 31 I. C. C. 281, cited, the complainant sought an order of the Commission to compel the defendant railroads to join it in through routes and joint rates between certain Tennessee River landings, and points on the lines of the defendants and their connections, on the ground that the railroads maintained such routes and rates on shipments via the competitors of complainant line, while refusing to grant the same privileges to complainant. The Commission held that such refusal was discriminatory. That case is distinguishable from the instant case. The evidence supported such a finding. In the instant case, no through routes were in existence between appellee railroads (or any other railroad serving Galveston, Texas) and any barge line operating from that point via the Intercoastal Canal or over any other water route, to any point in the territory here involved, with

respect to shipments of sulphur or any other commodity as far as the record shows.

In *Pacific Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472, cited by appellant United States, the complainant, operating steamers between San Francisco, San Pedro and San Diego, California, sought an order of the Commission requiring the defendant railroads to establish through routes and joint passenger fares with its steamers to the same extent as they maintained such routes and fares with complainant's competitors, the Pacific Coast Steamship Co. and the San Francisco & Portland Steamship Co. From the evidence before the Commission in that case it found that the refusal of the defendant railroads to maintain through routes and joint fares with complainant, while maintaining such routes and fares with its competitors, was a violation of section 3. In making this finding, the Commission observed (p. 479) that if railroads are permitted to choose the particular boat lines they will make arrangements with in establishing such routes and fares, they would be able to dictate who shall and who shall not operate on the water and drive rail competitors out of business. In the instant case no question of rail carriers favoring one water carrier over another is involved and there is no question of a railroad entering into through routes and joint rates with one water line serving Galveston while refusing to do so with respect to another. The Commission (p. 481) ordered the

rail defendants to establish through routes and joint fares and to cease and desist from the discrimination found to be unreasonable. That case is likewise distinguishable.

In *White Star Line* v. *N. Y. C. R. Co.*, 83 I. C. C. 473, the Commission found on the evidence in that case that the refusal of the defendant railroads, who participate in through routes and joint rates with the White Star Line from Port Huron and Detroit via Toledo to points on defendant railroads' lines, while maintaining such routes and rates with the Detroit & Cleveland Navigation Company, was unduly prejudicial (p. 478) and ordered the defendants to join complainant in establishing through routes and joint differential rates. It is, therefore, clear that that case is distinguishable from the instant case.

Appellant United States also relies on *Ann Arbor R. R. Co.* v. *B. & O. R. R. Co.*, 136 I. C. C. 578. That case is distinguishable. There the Commission found from the evidence before it that the failure of the Chesapeake & Ohio and the Norfolk & Western to participate with the Ann Arbor and its connecting lines in through routes and joint rates across Lake Michigan on coal from Virginia, West Virginia and Kentucky to destinations in Iowa, North and South Dakota, and Wisconsin while contemporaneously participating in such routes and rates east of Chicago with the Pere Marquette on like traffic from and to the same points via Chicago, was dis-

criminatory, in violation of section 3 of the Act. It ordered the discrimination removed by the establishment of through routes and joint rates.

The barge lines also cite and rely on (Brief, pp. 29–30) the Commission's decision in *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I. C. C. 528. The holding in that case was that the Commission had the power not only to establish through routes in connection with barge lines, but also nondiscriminatory joint rail-barge-rail rates, and in determining what would be necessary to remove any discrimination in the rates found to exist, the Commission may require the rail lines, which form part of both routes, to join in a lower rate over the rail-barge-rail route (pp. 546–547). The evidence in that case supported the findings that the through routes and joint differential rates authorized were in the public interest. In the instant case, the evidence would not support such findings. Further, that case involved principally the question of reasonable divisions of joint rates established between the railroads and barge lines. That holding is not inconsistent with the Commission's decision in the instant case.

Each case must stand on its own facts, and the Commission in the instant case found from the evidence that a violation of section 3 (4) has not been shown. On different facts and under different circumstances it was found in the cases cited and relied upon by appellants that there was

a violation of section 3. *New York Dock Ry.* v. *Baltimore & O. R. Co.*, 32 I. C. C. 568; *Empire Steel & Iron Co.* v. *Director General*, 56 I. C. C. 158; *Chicago, M. & St. Paul Ry. Co.* v. *Union Pac. R. Co.*, 88 I. C. C. 312.

If discrimination under section 3 (4) could have been found on the evidence in this case, the Commission may have ordered the carriers to remove it themselves, or by resort to section 15 (1) of the Act which empowers it to "determine and prescribe" what will be the just and reasonable rate, and to order the carriers "to cease and desist" from such violation.[10] It was incumbent upon the barge lines to prove discrimination which they failed to do. This Court held in *Virginian Ry.* v. *United States*, 272 U. S. 658, 663, that:

> Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some error in the application of rules of law. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268.

[10] Commission orders to remove discrimination usually do not fix the rates. The carriers are left free to remove the discrimination either by raising the lower rate, or by lowering the higher rate, or by doing both. *United States* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 651. If a carrier does neither the Commission may prescribe a reasonable nondiscriminatory rate under section 15 (1).

There is no merit to appellants' claim that the Commission has misconstrued or misapplied the provisions of section 3 (4) of the Act in reaching its ultimate conclusion and findings in this case.

B. The joint barge-rail rates sought by appellant barge lines are not required in order to carry out the National Transportation Policy

Appellant United States (Br. p. 17 et. seq.) contends that joint barge-rail rates are necessary to carry out the National Transportation Policy, and that the Commission was required under section 307 (d) of the Act to find that the establishment of such rates was "necessary or desirable in the public interest."

We do not deny that it has been the policy of Congress for many years to encourage and develop water transportation service and facilities in connection with the commerce of the United States, but that policy also has been to "foster and preserve in full vigor both rail and water transportation" (Transportation Act of 1920, Sec. 500, 41 Stat. 499). It is still the policy of Congress, "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each" (Statement of National Transportation Policy, Transportation Act of 1940, 54 Stat. 898, 899).

We respectfully submit that it has never been and is not now the policy of Congress, as reflected

in any declaration, or in provision of law implementing any such policy to require rail carriers to relinquish their "natural" or "inherent" advantages in order to favor barge lines.

In support of its argument that the barge lines have the "inherent" or "natural advantage," with respect to the traffic involved in this appeal (because of the lower cost of barge carriage as compared with that of the railroads, and that the savings in the costs must be passed on to those who ship by barge (Br. p. 24 et seq.)), it relies on the decision of this Court in *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. That case is distinguishable and is not controlling.

In the *Mechling* case the Commission's order specifically related to the railroad rate on grain transported from Chicago to New York, and other eastern points, after the grain had been moved to Chicago from the west by connecting rail carriers on through bills of lading. The rates applied on these shipments were combinations of distinctly separate charges for the shipment from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is a "proportional" or "reshipping" rate, which is lower from Chicago to the east than the "local" rate, i. e., the rate charged for a shipment from Chicago to the east which originates at Chicago.

The eastern railroads for many years had carried grain east from Chicago at a proportional or reshipping rate 8½ cents per 100 pounds

lower than the local rates. Prior to 1939, such rate had been the same for grain whether brought to Chicago by a connecting railroad, a connecting lake steamer, or a connecting barge. Because the barge lines could afford to charge cheaper rates on their movements to Chicago than the railroads, the grain traffic from localities served by the railroads shifted to the barges.

In 1939 the eastern railroads filed schedules with the Commission imposing on ex-barge grain the local rate from Chicago east, but allowed the ex-rail and ex-lake grain the benefit of the 8½ cent lower "proportional" or "reshipping" rates on eastern hauls. The result of this rate would have put the barge lines at a great competitive disadvantage with railroads in barge-served localities.

The Commission found the originally proposed 8½ cent higher rates for ex-barge grain to be unlawful, but concluded that the ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per 100 pounds higher than for ex-rail and ex-lake grain. The effect of the order was that the railroads could charge higher proportional or reshipping rates for ex-barge than for ex-rail or ex-lake grain.

The order, challenged in the District Court, was set aside to the extent it permitted the 3-cent extra charge. On appeal to this Court the lower court's decision was affirmed. This Court, after

reviewing the provisions of the Water Carrier Act of 1940, and discussing other provisions of acts of Congress as well as the Transportation Policy, stated (p. 577) that:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. * * * And section 307 (d), authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions which were strengthened in 1940 expressly to prevent a discrimination against water carriers.

The Court held that it was not within the Commission's power to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service, or to protect the traffic of railroads from barge competition, and that Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantages" of barge transportation in whole or in part. After stating (p. 578) that the Commission's order was not supported by its conclusion "that it is 'inequitable' for the barges to charge a much lower rate for the inbound grain

haul than the competitive western railroads can afford to charge for the same haul, resulting in barge-rail rates lower than all-rail rates from the same localities," the Court said (p. 579):

> * * * Furthermore, Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 97.

It will thus be seen that this Court's decision in the *Mechling* case was influenced largely by that part of the National Transportation Policy proclaimed by Congress (54 Stat. L. 899), which requires that the Act must be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation subject to * * * this Act." The Court held on the facts in that case that a rate proposed by the railroads

(and approved by the Commission) on ex-barge grain arriving at Chicago for movement to eastern destinations, higher than that on ex-lake or ex-rail, was discriminatory and that such rate prevented the preservation of the "inherent advantages" of water transportation in violation of the National Transportation Policy. That was the main holding in the case.

In the *Mechling* case the grain concerned originated at elevators either along or in close proximity to the Illinois Waterway, or at elevators similarly situated along other navigable waterways with which the Illinois Waterway is connected, e. g., trans-Mississippi River territory. (*Grain Proportionals, Ex-Barge to Official Territory,* 246 I. C. C. 353, 361.) The grain there was handled in such a way as to permit it to be accorded the benefit of proportional rates beyond Chicago.[11] The rates involved would have restricted their application on grain from Chicago, and other grain rate-break points, to eastern

[11] The Commission has defined a proportional rate as a part or a remainder or balance of the through rate. It has said that there must be an examination and consideration of the entire rate from point of origin or production to ultimate destination (*Grain Proportionals, Ex-Barge to Official Territory*, 246 I. C. C. 353, 370). In order to secure the benefit of such rate the original billing showing such data as origin of shipment, destination, charges paid, weight, etc., must be registered with the railroads' Inspection and Weighing Bureau, for use in connecting such shipments with outbound billing to points beyond the rate-break point, *id.*, pp. 372–373.

destinations so they would not apply on ex-barge (Illinois Waterway) traffic (248 I. C. C. 307). The traffic concerned moved over through routes and proportional rates. There were no single factor rates involved or any question of divisions of joint rates, or of short-hauling. The grain originated with the barge line and prior rail haul was not a factor of consideration as in the instant case.

In the instant case there are no through routes. The record is devoid of any evidence that a single shipment of sulphur on a through bill of lading ever moved via common carrier by water and rail from Galveston to Danville or that the railroads ever held themselves out, or entered into any agreement, with any water carrier to transport any sulphur between these points. *Thompson* v. *United States*, 343 U. S. 549, 551–561. Neither joint rates nor proportional rates can be established in the absence of through routes. *Western Pacific R. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I. C. C. 489, 499.

In the instant case the proposed water-rail movement of sulphur from Galveston to Danville would be interspersed between two rail movements requiring a double transfer of lading. Since the railroads serve the mines and can, and do, transport the sulphur from the mines to ulti-

mate destination (Danville) in an all-rail movement, without unloading at interchange points (Galveston and East St. Louis) they have a natural advantage.

On any sulphur utilizing the proposed barge-rail service the railroads would have to move it from the interior Texas mines to Galveston, where it would have to be unloaded from rail car to barge (R. 23), and after the barge movement to East St. Louis it would then have to be unloaded from barge into rail cars (R. 24), which would be economically wasteful transportation. This is particularly true when the sulphur can be moved the entire distance by rail at a rate (shown by the record to be reasonable) which is lower than the rail-barge-rail rate and charge for the through movement.[12] The expense of the rail

[12] The present combination barge-rail rate is 91.4 cents lower than the present all-rail rate ($9.184−$8.270=91.4 cents). The joint barge-rail rate proposed by the barge lines is $7.67 (R. 24), which is lower by $1.514 than the present all-rail joint rate $9.148−$7.670=$1.514) (R. 30). The Commission held in its report on reconsideration (R. 30) that:

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cite decisions in which

haul to Galveston and those incident to the transfer from rail car to barge at that point are not absorbed by the barge lines (R. 12). Such expenses would off-set the otherwise lower cost of Water Transportation.

The foregoing circumstances clearly reveal that there is no "inherent advantage" in using the water carrier service proposed and sought by appellants. We submit that the "inherent advantage" contemplated by the National Transportation Policy is in favor of the railroads.

In its decision the Commission shows that it considered the inherent advantages of water transportation in this case, where it stated (R. 27):[13]

> In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville

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such rate differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

[13] The report of Division 3, containing the above-quoted excerpt, was approved by the entire Commission on reconsideration (R. 33).

> is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

The "inherent advantages" found to favor the barge lines in the *Mechling* case, certainly cannot be found to favor appellants in the instant case. The decisions of the Commission and the court below, finding that the *Mechling* case is not controlling and that no discrimination under section 3 (4) of the Act is shown, are correct and are supported by the law and the evidence of record. *Alabama Great Southern R. R. Co.* v. *United States*, 340 U. S. 216. These decisions are in harmony with the National Transportation Policy as revealed by the legislative history of that policy.[14]

[14] The legislative history of the National Transportation Policy, as expressed in the Transportation Act of 1940, reveals quite clearly that Congress never intended that the natural advantage the railroads have in the instant case

We are unable to find anything in the National Transportation Policy that would require the

should be extinguished by forcing them to relinquish such advantages to a competing water carrier.

In 84 Cong. Rec. at page 5883, the following appears:

"Mr. AUSTIN. So, if there is one type of common carrier which has a natural facility or a natural advantage over another, the bill does not require, indeed, I understand it not to permit, the extinguishment of the natural advantage in competition for the benefit of the competitor which has not the advantage. Am I correct in that interpretation?

"Mr. WHEELER. The Senator is entirely correct, and I thank him for his statement. In the rate-making provision, and in three different places in the bill, we wrote in such a provision specifically so as to protect them."

In 84 Cong. Rec., at page 5958, the following appears:

"Mr. TRUMAN. Mr. President, the reason the discussion always gets back to the railroads is that the railroads handle about 67 percent of all the traffic. In 1926 they handled 75 percent of all the traffic. The present condition of the railroads is due to a great many things which are not necessary to be considered at this time. The railroads are absolutely essential to the welfare of the country, and they should not be discriminated against any more than any other method of transportation should be discriminated against. The object of the pending bill is to try to put all methods of transportation on an equal basis [equal before the law]. If it will not do that we shall have failed in our effort."

In 86 Cong. Rec., at page 10172, the following appears:

"The conferees are unanimously in harmony in the viewpoint that the inherent advantages of each type of carrier should be preserved for the benefit of the Nation. Legitimate regulation must look to the protection of the economic advantage of each type of carrier against destructive competition of the other. No carriers should be required to charge unreasonable rates for the benefit or purpose of compelling diversion of traffic to a competitor.

"The other provisions of this bill afford ample protection for the preservation of the inherent advantages of water transportation."

Commission to make any findings different from those it has made in this case. Neither is there anything in the Water Carrier Act, including section 307 (d), that requires the Commission to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established and differentials fixed differently from those already established and in effect.

II.

Discrimination prohibited by Section 3 (4) of the Act does not result when a railroad demands its full local rate on traffic received from a barge line connection while accepting as compensation a lesser amount, in the form of a division of a joint through rate on such traffic received from a rail connection, under a joint rate agreement

The contrary allegation is made by appellant barge lines, in their brief, p. 34, and constitutes the second ground upon which these appellants challenge the validity of the Commission's order. This allegation is based upon the finding of the Commission (R. 31–32) that the discrimination under section 3 (4) of the Act may not be predicated upon the fact that the separately established rate paid by a shipper, on ex-barge traffic beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis with respect to ex-rail traffic moving from the same origin to the same destination.

In support of their claim that appellee railroads treat the barge lines differently in the matter of rates on ex-barge sulphur, than they treat connecting southwest rail lines on ex-rail sulphur, appellants refer (p. 8 of their brief) to the joint barge-rail rate on sulphur of $6.66 from Port Sulphur to Danville, out of which the Federal and American barge lines receive a division of $4.40 for their haul to East St. Louis, and the appellee rail carriers receive a division of only $2.26 for their haul from East St. Louis to Danville, while the rail carriers, receive from their rail connections, reaching that point from Galveston, an unpublished division of the all-rail rate of $9.184, an amount (not shown in the record) [15] less than their local rate of $2.95 for the East St. Louis-Danville haul (R. 82–83).

Under appellant barge lines' theory of the case a division of a joint all-rail rate is the same thing as a rate or charge and may be compared with

[15] There is no requirement of law or any rule or regulation of the Commission that agreements of railroads as to division of rates and charges be published or filed with the Commission, or the amount of the division be made known to the public. *Acme Mills* v. *Director General*, 81 I. C. C. 492; *Chase & Co.* v. *New York Central R. Co.*, 161 I. C. C. 614, 616. Divisions of rates are based upon private contracts between the carriers concerned and do not have to be approved by the Commission, except as provided in section 15 (6) of the Act. *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136, see footnote 2, pages 139–140.

and treated the same as a published rate or charge paid by a shipper.

In their complaint before the Commission, these appellants did not raise the issue that a division of rates between carriers was a rate within the meaning of section 3 (4) of the Act, or that discrimination may exist because of the difference between a local rate and a division of rates. The charge of discrimination in the proceedings before the Commission was predicated only upon the allegation that appellee railroads participate in through routes and joint rates with other railroads, over all-rail routes, while contemporaneously refusing to join with the barge lines in through routes and joint rates, with reasonable differentials under the all-rail rates, and that refusal to do so resulted in rates and charges over barge-rail routes that are excessive and unreasonable, and such refusal is discriminatory against appellants (Appellants' complaint in the Commission proceedings, Paragraphs III and V) (R. 63-64).[16]

That the issue of whether divisions of rates between carriers are rates within the meaning of

[16] The only other allegation appellants made in their complaint before the Commission with respect to discrimination was in those paragraphs, except the allegation in Paragraph IV, relative to a reduction of all-rail rates on sulphur from Galveston and other Texas points and Port Sulphur to Danville, which became moot by reason of the fact that the rates referred to therein were suspended by the Commission and later withdrawn (R. 96).

section 3 (4) of the Act was not raised by the complaint before the Commission, or relied upon by appellants in the Commission proceedings, is further shown at the oral argument before the Commission.[17] During the argument counsel for appellant barge lines stated (R. 147–148) that he did not think this was "one of the issues" of the complaint because the complaint of the barge lines "asks for joint through rates to cure the discrimination." (See also R. 31.) Therefore, since the question was not raised or pressed, and in fact was waived, before the Commission, it should not be considered upon court review. *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774; *General Transportation Co.* v. *United States*, 65 F. Supp. 981, affirmed *per curiam* 329 U. S. 668; *United States* v. *Tucker Truck Lines*, 344 U. S. 33; *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506, affirmed *per curiam* 344 U. S. 883; *Helvering* v. *Tex.-Penn Oil Co.*, 300 U. S. 481, 498.

The fact that the Commission discussed and considered this question in its decision does not

[17] The only way the question of divisions arose before the Commission was that, during the hearing, it was brought out that the rail carriers received a division of the joint rail rates for their haul from East St. Louis to Danville, an amount less than the local rate of $2.95 between these points. In later proceedings the barge lines contended that this constituted a violation of section 3 (4). See Reply of Complainants [Barge Lines] To Defendants' Exceptions (pp. 11–12) and Petition For Reopening, etc., filed with the Commission on April 24, 1952.

lessen the force of the argument that it cannot be raised on judicial review. The Commission merely answered a contention not raised in the complaint before it and if properly before it, not pressed, but in fact waived. Even assuming that the issue of divisions versus rates was before the Commission, it is submitted that a division of a joint through rate is not a "rate" or "charge" as those terms are used in section 3 (4) of the Act, and a finding of discrimination could not be based on that issue.

The Commission distinguished these two terms in its report on reconsideration (R. 31), where it stated and found that:

> * * * The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on

> ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3 (4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The Commission does not consider a division of a joint rate between carriers to be in the same category as a published rate which a shipper pays. It is true that in the early case of *Western Pacific R. R. Co.* v. *Southern Pacific Co.,* 55 I. C. C. 71, decided in 1919, the Commission held that the expression of rates and charges in the form of divisions "makes them rates and charges, which may be discriminatory." However, that case is distinguishably from the instant case as is referred to in the above excerpt.[18] That case was

[18] In that case, the issue was whether the divisions of joint fares were discriminatory between connecting carriers. In the instant case, no joint rates between the barge and rail lines were in existence on sulphur or had ever been in existence. In such a situation, the question of divisions of rates does not and cannot arise. It is only when joint rates have been established that questions of divisions may become an issue before the Commission or the courts.

decided at a time when the Commission was not certain as to the extent of its powers to establish divisions of joint rates which, then, was controlled by the Act of June 18, 1910, and enacted as a part of section 15 as a corollary to the power delegated to it to prescribe joint rates (Chapter 309, U. S. Statutes at Large, Part I, Public Law 511).[19]

As a result of the uncertainties of the extent of the Commission's power over divisions of joint rates the Interstate Commerce Act was amended by the Transportation Act of 1920 (Ch. 91, Sec. 418, Stat. 486), by the substitution of the present paragraph (6)[20] for the provision quoted in

[19] The authority given to the Commission by this statute was as follows:

"* * * Whenever the carrier or carriers, in obedience to such order of the commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto; which order shall take effect as a part of the original order."

[20] Section 15 (6) now reads as follows:

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have

footnote 19. See *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 119–123.

The *Western Pacific case*, *supra*, (191 I. C. C. 127) involved the issue of joint passenger fares which had been agreed upon by the carriers after they had voluntarily entered into through routes and joint rates with each other. The complainants in the Commission proceedings had invoked section 3 (2) (now section 3 (4) of the Act), instead of section 15, which undoubtedly was due to the lack of clarity of the Commission's power over such divisions. The Commission, recognizing that the complainant was entitled to some readjustment of the division of joint fares, which was shown by the evidence

been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

in the case to be unjust and unreasonable as between the parties, heard and determined the issue under section 3, not being certain of the extent of its power under section 15. In any event that decision is to be evaluated in the light of the statutory provisions then existing, as heretofore described, and the circumstances peculiar to that particular case. It is inconceivable that such a case now coming before the Commission, involving divisions of joint rates, would be entertained under the present provisions of section 3 (4) of the Act.

As we have heretofore pointed out, appellant barge lines charged in their complaint before the Commission (R. 63–64) that the railroads had failed to establish through routes and joint rates with water carriers, in violation of sections 1 and 307 (d) of the Act; and that they were maintaining rates and charges which were discriminatory against barge lines, in violation of section 3 (4). This latter section, insofar as pertinent here, deals only with "rates, fares, and charges" and it is difficult to see how the issue of divisions of joint rates can be predicated upon section 3 (4) since no discrimination prohibited therein can arise because of divisions of joint rates between the parties thereto.

The Commission has held since the earliest days of its existence as a regulatory body that a comparison of a division of a joint rate and a local

rate is not a proper test of the lawfulness of either. *Board of Trade of Troy, Ala.* v. *Ala. Mid. Railway Co.*, 6 I. C. C. 1; *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12. This Court held in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 457, that the fact that a portion of a through joint rate received by one of the carriers, parties thereto, may be less than its local rate, is not questioned. See also *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197, 239. It is submitted that the establishment of local rates are predicated upon considerations wholly different from those employed in determining the divisions of joint rates. This led the Commission to observe in its report on reconsideration (R. 32) that "The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things."

The distinction between local rates and divisions of joint rates is further emphasized by the fact that when Congress amended section 15 of the Interstate Commerce Act in 1920, giving the Commission for the first time definite powers (which theretofore had been uncertain) over division of rates, it set forth certain standards or criteria by which the Commission was to be governed in prescribing the amount of the division. A search of the Act does not reveal any similar provision governing the Commission's prescription of other characters of rates.

In support of their argument that the difference between divisions of joint all-rail rates and a local rate is offensive to the prohibition against discrimination in section 3 (4) of the Act, the appellant barge lines rely upon the decision of this Court in the *Mechling* case, *supra* (brief, p. 46 et seq.). As we have already shown, page 40, et seq. of this brief, the *Mechling* case is readily distinguishable. That case involved proportional rates which were alike in their nature and basis of establishment. In the instant case appellants are attempting to compare a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, which cannot be done (R. 32).

The United States is of the view that since the refusal of the railroads to establish joint rates with the barge lines "constitutes a discrimination in rates" between connecting lines, it is unnecessary to reach the question of whether a division of a joint through rail rate is a rate within the meaning of section 3 (4) of the Act. We agree that it is not necessary to reach the question, but for a different reason. Our view is that the question of divisions versus rates is not before this Court, because that question was not raised by appellant barge lines in their complaint before the Commission, and if it were raised it was waived by counsel for the barge lines at the oral argument (R. 147, 148). If the Court considers that the question is properly before it, we submit

for the reasons stated above, the question should be resolved in favor of the conclusions reached by the Commission.

Appellants argue that because the railroads voluntarily entered into through routes and joint rates with the Federal and American barge lines, in regard to the movement of sulphur from Port Sulphur, La., via East St. Louis to Danville, Ill., at a joint rate of $6.66, with a division of $2.26 to the rail carriers and $4.40 for the barge lines, it is unreasonable and discriminatory for the railroads not to enter into such rates and rates with the barge lines with the same division of rates on sulphur from Galveston.

The answer to this argument is that the railroads originate the sulphur the barge lines want to move from Galveston. The sulphur moving from Port Sulphur originates with the barge lines. The discrimination is not alleged to be with respect to sulphur from Port Sulphur but from Galveston. What the East St. Louis-Danville lines receive as their share of the rate from Port Sulphur is not a fair standard of measurement of the reasonableness as to the lawfulness of the rate from Galveston. In *Tozer* v. *United States*, 52 F. 917, certiorari denied 146 U. S. 354, the Circuit Court for the Eastern District of Missouri held, pages 918–919, that where two connecting lines agree on a joint through tariff, such tariff, or the

share of it which either takes, is not the standard by which to determine whether either line violates, by its local rates, section 3 of the Interstate Commerce Act forbidding undue preference (the same would be equally true with respect to discrimination). The court, referring to its decision in *Chicago & N. W. Ry. Co.* v. *Osborne,* 52 F. 912, announced at about the same time as the *Tozer* decision, stated, page 919:

> It was there held that each company established its own tariff, and that the reasonableness of the tariff of one is not determined by that of any other. * * * that two connecting companies, forming by agreement a joint through tariff, create thereby, as it were, a line new and independent of that of either of the two connecting companies; and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined.

In the instant case, the barge lines not having the "inherent" or "natural advantage," with respect to the sulphur traffic at Galveston, seek to overcome that handicap by forcing the railroads operating from East St. Louis to Danville to forego the difference between their local rate of $2.95 and $2.26 (which they supposedly receive as a division on sulphur moved from Port Sulphur), or 69 cents per ton, partially to offset the $1.50 per ton cost to the shipper at Galveston.

In any event a railroad does not have to agree to establish through routes and joint differential rates with other railroads or with water carriers at every point merely because it does so at one point. If so, it would follow, that such routes and rates would be compelled everywhere if established at any given point.

Finally, in regard to appellant barge lines' contention that the District Court did not pass upon the question of discrimination under section 3 (4) of the Act, or on the question of whether a division of a joint rate is a rate within the meaning of that section (barge lines' brief, pp. 17–18), it is submitted that the court below did consider these questions.

The Court specifically found at page 33 of the opinion (R. 52; 129 F. Supp. 28) that:

> When the whole record is considered in the light of all the provisions of the Act and the many cases construing same, we think plaintiffs have not shown their claim of discrimination to be meritorious.

This finding or conclusion is adequate. We know of no law or decision of the courts requiring that a different kind of finding or conclusion should be made or stated.

Even assuming that all the issues raised by appellants may not have been specifically discussed in the Court's opinion, nevertheless this would be similar to a court saying as this Court

said *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291:

> We have examined other contentions urged in support of the District Court's judgments and find that all are without merit.

In *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, 84, the Court said:

> * * * While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.

We, therefore, submit that it is not necessary that the trial court make findings asserting the negative of each issue of fact raised. As the Court said in *Carr* v. *Yokohama Specie Bank, Limited*, 200 F. 2d 251, 255:

> * * * Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence.

CONCLUSION

The judgment entered by the district court should be affirmed.

Respectfully submitted.

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MARCH 7, 1956.

APPENDIX

Pertinent Provisions of the Interstate Commerce Act

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1 (4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request

therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed,

or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15 (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may

determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and

the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Sec. 307 (d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water * * *.

U. S. GOVERNMENT PRINTING OFFICE 1956